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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re the Marriage of WOODROW AND CHERYL BRYAN.	
WOODROW WILLIAM BRYAN, Appellant, v. CHERYL BRYAN, Appellant.	E067126 (Super.Ct.No. IND1201068) OPINION

APPEAL from the Superior Court of Riverside County. Mickie E. Reed, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed as modified.

Law Offices of David S. Karton, David S. Karton; Law Offices of Stephen Temko and Stephen Temko for Appellant Cheryl Bryan.

Lewis Brisbois Bisgaard & Smith, Lann G. McIntyre; Virginia S. Criste and Virginia S. Criste for Appellant Woodrow William Bryan.

Cheryl Bryan (Cheryl) and Woodrow William Bryan (Bill) married in 1982, and Bill petitioned for dissolution of their marriage on June 12, 2012.[1] The 22-day trial began August 10, 2015, and ended May 5, 2016. The trial court entered a status-only dissolution judgment on October 28, 2015, and then a judgment on reserved issues, which incorporated the court's statement of decision, on October 24, 2016. Cheryl timely appealed from the judgment on reserved issues, and Bill timely cross-appealed. Each party raises several issues, primarily focusing on the management and division of marital property.

We conclude that, with the exception of a single point of error raised by Bill and conceded by Cheryl, all of the parties' arguments lack merit. We therefore modify the judgment to correct the one conceded error and affirm the judgment as modified.

BACKGROUND

Over the course of their marriage, Cheryl and Bill built an agriculture irrigation business, Farm Water Technological Services, Inc. (hereafter Water Tech), of which Bill was president and Cheryl was chief financial officer and secretary. In 1983, Water Tech issued 1,008 shares of stock to Cheryl and Bill jointly, as "Husband and Wife." Later, the parties apparently attempted to alter the share ownership so that 51 percent would be in Cheryl's name and the remaining 49 percent would be in Bill's name. Later still, they appear to have tried to alter it further, with 52 percent in Cheryl's name and 48 percent in Bill's name. The parties disagree about the import of the unequal share ownership, an

[1] Because the parties have the same last name, we will refer to them by their first names in order to avoid confusion. No disrespect is intended.

issue we address in greater detail, *post*. Despite the unequal share ownership, the court divided the value of Water Tech and all other family businesses equally between the parties on the ground that they were presumptively community property because they were acquired during the marriage, and the presumption was not rebutted.

Cheryl and Bill also created an affiliated corporation in Mexico, Water Tech de Mexico. The trial court found that "Water Tech de Mexico was . . . a wholly owned subsidiary of Water Tech to expand business in Mexico." Ninety-nine percent of Water Tech de Mexico's stock was in Bill's name, and the remaining 1 percent was in Cheryl's name. Bill testified that this was the result of a miscommunication between himself and the Mexican lawyer, but he never spent the time and money to correct it because he always believed that both Water Tech de Mexico and Water Tech were community property.

On November 1, 2013, Cheryl and Bill sold the assets of Water Tech to another corporation, identified in the record as "RDO." Cheryl's son, Richard Arias, worked for Water Tech and was to receive $1 million in connection with the sale to RDO. Arias testified that Cheryl and Bill agreed to pay him the $1 million unconditionally, but Bill testified that he agreed only that Arias would be paid the $1 million on condition that Cheryl equalized the share ownership of Water Tech. Arias ultimately filed suit (the Arias litigation) to collect the $1 million. The case settled, and Arias recovered the $1 million, plus attorney fees.

Additional facts will be described as needed in our discussion of the issues raised by the parties.

DISCUSSION

I. *Cheryl's Appeal*

A. *Date of Separation*

The trial court found that Cheryl and Bill separated on October 8, 2011. Cheryl argues that the judgment must be reversed because the court "failed to consider all relevant facts in determining the date of separation." (Boldface and capitalization omitted.) The argument lacks merit for multiple reasons.

Separation occurs when at least one of the parties "*does not* intend to resume the marriage *and* his or her actions bespeak the finality of the marital relationship." (*In re Marriage of Hardin* (1995) 38 Cal.App.4th 448, 451 (*Hardin*).) The trial court's determination of the date of separation is a factual finding. (*In re Marriage of Manfer* (2006) 144 Cal.App.4th 925, 930.) Consequently, "[o]ur review is limited to determining whether the court's factual determinations are supported by substantial evidence and whether the court acted reasonably in exercising its discretion." (*In re Marriage of De Guigne* (2002) 97 Cal.App.4th 1353, 1360.)

Substantial evidence supports the trial court's finding that the date of separation was October 8, 2011. The findings of fact in the court's statement of decision include the following: "Parties separated in late 2011. [Bill] contends the separation date was September 22, 2011. [Cheryl] contends that the separation date was sometime in late October, 2011. [Cheryl's] Response lists the date of October 8, 2011, or according to proof. [Cheryl] had been admitted into the hospital and [Bill], even though he decided to end his marriage, had not yet communicated same to [Cheryl]. In a conversation with

[Cheryl's] son, [Arias], sometime from September 26th to October 2, 2011, [Bill] shared that he was done with the marriage. Mr. Arias told his mother of [Bill's] statements."[2] The statement of decision goes on to state that "[e]ven though [Cheryl] was in the hospital and not sleeping in the house, [Bill] did not communicate his decision to end his marriage. [Cheryl] found out from her son. She knew when returning from the hospital that she was separated from [Bill]. The court finds the separation date to be October 8, 2011, as [Cheryl] lists on her Response."

All of those findings are supported by substantial evidence. Cheryl testified that she was hospitalized in September and discharged on October 28, 2011. Arias testified that "[r]ight around the 1st of October, late September," Bill told Arias that Bill wanted to divorce Cheryl but had not told her yet, and Arias then told Cheryl "[w]ithin 24 hours." Cheryl too testified that while she was hospitalized, Arias told her of Bill's intention to divorce her. Bill testified that in late October he moved Cheryl's personal effects out of their La Quinta home, and Cheryl stipulated that Bill has resided in that home since they separated. Bill testified that on September 22, 2011, he told Cheryl that he was leaving and not coming back. The trial court apparently did not find that testimony credible, because the court found that Arias, rather than Bill, told Cheryl of Bill's decision to end the marriage.

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[2] The statement of decision refers to Bill as "Petitioner" and Cheryl as "Respondent," but the quoted passage inadvertently refers to Bill as "Respondent" twice: It says that "Respondent shared that he was done with the marriage" in the conversation with Arias, and "Mr. Arias told his mother of the Respondent's statements." The context makes clear that the court was referring to Bill both times.

Cheryl argues that the trial court erred by relying "solely on the qualified date of October 8, 2011," because a "date in a pleading . . . is NOT necessarily controlling." The argument fails because the court did not rely solely on the date in the pleading or treat it as controlling. Rather, the court considered the evidence admitted, including witness testimony, and found that the separation date was October 8, which Cheryl had pled in her response.

Cheryl further argues that under *Hardin*, *supra*, 38 Cal.App.4th 448, the court is required to consider all relevant evidence in determining the date of separation, and the court committed reversible error by failing to do so. The argument fails because Cheryl does not cite anything in the record showing that the court failed to consider relevant evidence. Cheryl argues that "among the many relevant factors is whether and, if so when, Bill expressed to Cheryl his intent to end the marriage."[3] But the statement of decision confirms that the court did consider that factor—in its discussion of the separation date, the court found that Bill did not directly tell Cheryl of his intention to end the marriage, but Bill told Arias, who told Cheryl.

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[3] In her reply brief, Cheryl argues for the first time that "communication from one spouse to the other spouse to terminate the marriage has been required at *all* times" by case law and also by statute since January 1, 2017, the effective date of Family Code section 70. Cheryl did not make this argument in her opening brief, contending instead that communication from one spouse to the other is "among the many relevant factors" but never arguing that it is required. We do not consider arguments raised for the first time in a reply brief absent a showing of good cause for failure to raise them earlier. (*Campos v. Anderson* (1997) 57 Cal.App.4th 784, 794, fn.3.) Cheryl has made no such showing.

Nor does *Hardin* support Cheryl's claim of error. In *Hardin*, the trial court concluded that the legal standard for determining the date of separation was: """Would society at large deem the couple to be separated based upon the facts and based upon the evidence [presented]?""" (*Hardin*, *supra*, 38 Cal.App.4th at p. 450.) On that basis, the trial court determined that evidence of the parties' subjective intent was irrelevant and that the parties were legally separated in 1969, even though the husband did not make up his mind about divorce until 1982 or 1983. (*Ibid.*) The Court of Appeal reversed, concluding that the correct legal standard is that "the date of separation occurs when either of the parties *does not* intend to resume the marriage *and* his or her actions bespeak the finality of the marital relationship." (*Id.* at p. 451.) Because the trial court's application of an incorrect legal standard had led the court to disregard or exclude facts and evidence—such as evidence concerning the parties' subjective intent—that would be relevant under the correct standard, the judgment was reversed for a new trial on the separation date. (*Id.* at pp. 453, 455.) Here, in contrast, Cheryl has not shown that the trial court relied on an incorrect legal standard or failed to consider all evidence that was relevant under the standard that the court applied.

Moreover, the appellant bears the burden of demonstrating not only error but also prejudice. (See, e.g., *In re Marriage of McLaughlin* (2000) 82 Cal.App.4th 327, 337.) In her opening brief, Cheryl asserts that "[t]he finding of the date of separation has serious financial consequences," but the single paragraph addressing this issue contains no citations to the record, which consists of a 14-volume appellant's appendix and an eight-volume reporter's transcript. An appellate brief must "[s]upport any reference to a matter

in the record by a citation to the volume and page number of the record where the matter appears." (Cal. Rules of Court, rule 8.204(a)(1)(C).) When supporting record citations have not been provided, we may treat the points as forfeited. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246.) We do so here and conclude that Cheryl has not carried her burden of demonstrating that the alleged error in determining the date of separation was prejudicial.

For all of these reasons, we conclude that Cheryl has not shown error or prejudice with respect to the trial court's determination of the date of separation.

B. *Division of Water Tech*

Cheryl presents several arguments for the conclusion that the trial court erred by dividing the value of Water Tech equally between the parties rather than awarding 52 percent to Cheryl and 48 percent to Bill. Each of her arguments is meritless.

Cheryl begins with the assertion that "[t]he trial court found . . . that Cheryl and Bill agreed to divide their community property interest in Water Tech 52%/48%." She does not provide any citation to the record in support of that assertion. We have reviewed the trial court's statement of decision and judgment in their entirety, and they confirm that Cheryl's assertion is false. The trial court never found that Cheryl and Bill agreed to divide their community property interest in Water Tech unequally. Rather, the trial court found that Cheryl and Bill agreed that, for certain commercial purposes, the majority of shares of Water Tech's stock would be held in Cheryl's name, and the remaining minority of shares would be held in Bill's name. The distinction is significant, because directing that stock be held under one spouse's name or in one spouse's

brokerage account (or both) does not necessarily affect the character or ownership of the spouses' community interests. (See *In re Marriage of Barneson* (1999) 69 Cal.App.4th 583, 589-590 [addressing this issue in connection with transmutation].) Again, Cheryl cites no support for her assertion that the trial court found that the parties "agreed to divide their community property interest in Water Tech" unequally, and our own review of the record reveals that the assertion is false. The trial court made no such finding.

Next, after describing the evidence that she believes shows that the parties did agree to divide their community interest in Water Tech unequally, and after presenting her interpretation of the trial court's ruling, Cheryl summarizes her claims of error. First, she contends that the trial court erred by faulting Cheryl for failing to rebut the presumption under Family Code section 2581 that Water Tech was community property, because "Cheryl never disputed that the ownership was community or sought to change the character from community."[4] Second, she argues that "under sections 1620, 1500 and 721 an oral agreement is sufficient to establish the change in ownership as occurred between these parties and the agreement is enforceable under long standing California law." Third, she argues that "there was sufficient evidence to support a finding that there was a written agreement under section 2550." Fourth and finally, she argues that "section 2550 only requires that it only that undisputed *oral agreements made after a Petition for Dissolution has been filed,* must be stated in open court. [*Sic.*] Otherwise, Section 2550 would necessarily, but by implication, repeal sections 1620, 1500, and 721 made after

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4 All subsequent statutory references are to the Family Code unless otherwise indicated.

marriage but prior to the filing of a petition for dissolution. [*Sic.*]" In the ensuing pages, Cheryl elaborates on all of these arguments except the first. We address them in turn.

Cheryl's first argument does not show that the trial court erred. Under section 2581, "property acquired by the parties during marriage in joint form . . . is presumed to be community property," but the presumption may be rebutted in certain ways identified in the statute. The parties acquired the Water Tech stock during marriage in joint form.[5] The stock was therefore community property unless the presumption was rebutted. The trial court found that it was not rebutted and that the parties' interests in Water Tech were therefore community property. Cheryl's argument is that because she agreed that the parties' interests in Water Tech were community property, she "never had to rebut the presumption." The argument does not identify any error in the trial court's analysis—Cheryl does not deny that the presumption applied or that it was unrebutted. Whether it was unrebutted because Cheryl tried and failed to rebut it or did not try at all is of no consequence.[6]

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[5] The stock certificate identifies the registered holder of the 1,008 shares of stock as "Woodrow W. Bryan and Cheryl Bryan, Husband and Wife."

[6] Cheryl also argues that "section 2581 only applies when the parties dispute the characterization of property acquired during marriage in joint name," but section 2581 "does not apply if the parties change their ownership interests in what is undisputed to be and, as here, continues to be community property." It is not clear what Cheryl means by her claim that section 2581 "does not apply," or what her basis for that claim is. But again, the argument fails to establish error. The only consequence of the trial court's application of section 2581 is that the parties' interests in Water Tech are community property, and Cheryl expressly and repeatedly concedes that they are.

Cheryl's second argument concerns the interplay of sections 1620, 1500, 721, and 2550. Section 2550 provides that "[e]xcept upon the written agreement of the parties, or on oral stipulation of the parties in open court, or as otherwise provided in this division, in a proceeding for dissolution of marriage . . . , the court shall . . . divide the community estate of the parties equally." Section 1620 provides that "[e]xcept as otherwise provided by law, spouses cannot, by a contract with each other, alter their legal relations, except as to property." Section 1500 provides that "[t]he property rights of spouses prescribed by statute may be altered by a premarital agreement or other marital property agreement." And subdivision (a) of section 721 provides that, subject to subdivision (b) (concerning fiduciary duties), "either spouse may enter into any transaction with the other, or with any other person, respecting property, which either might if unmarried." Cheryl argues that under sections 1620, 1500, and 721, an oral agreement providing for unequal division of community property that is made during marriage but before a dissolution action has been filed is enforceable notwithstanding section 2550. In other words, according to Cheryl, section 2550 is implicitly limited to agreements made after a marital dissolution proceeding has been filed. She argues that a contrary interpretation would render sections 1620, 1500, and 721 "unenforceable" and "meaningless." We review de novo the interpretation of statutes. (*Daugherty v. City and County of San Francisco* (2018) 24 Cal.App.5th 928, 944.)

The argument lacks merit. Under section 1620, spouses may by contract alter their legal relations as to property, except as otherwise provided by law. Under section 721, spouses may engage in any property transactions with each other that they could

have engaged in if they were not married. And under section 1500, spouses may alter their statutory rights concerning property by a premarital agreement or other marital property agreement. Section 2550 does not nullify any of those powers, but it places a limitation on a specific category of interspousal property agreements—an agreement between spouses *for an unequal division of community property* is enforceable only if it is in writing or stipulated orally in open court. There is no conflict between the plain meaning of section 2550 and sections 1620, 721, and 1500. There is likewise no reason to read into section 2550 an implicit limitation to agreements made after the dissolution action has been filed, or otherwise to interpret section 2550 as meaning anything other than what it says. Cheryl cites no authority for the proposition that an oral, out-of-court agreement between spouses for unequal division of community property is enforceable notwithstanding section 2550, and we are aware of none.[7] For all of these reasons, we reject her argument.

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[7] Cheryl cites various cases from 1915, 1946, 1920, 1909, 1934, 1922, 1949, and 1914, none of which stands for the proposition that an oral, out-of-court agreement between spouses for unequal division of community property is enforceable notwithstanding section 2550. All of the cited cases either involved written agreements or had nothing to do with section 2550 (or its predecessor) or both. Cheryl also cites *Litke O'Farrell, LLC v. Tipton* (2012) 204 Cal.App.4th 1178, which involved a *written* agreement entered *after* the marital dissolution action was filed. (*Id.* at p. 1181.) That case consequently says nothing about the enforceability of an *oral* agreement entered *before* a dissolution action is filed. Cheryl also cites *In re Marriage of Evans* (2014) 229 Cal.App.4th 374, which involved a *written* agreement providing for *equal* division of the only significant community asset. (*Id.* at pp. 377-378.) The case does not mention section 2550 and says nothing about the enforceability of an *oral* agreement for *unequal* division of community property.

Cheryl's third argument is that the record contains "sufficient evidence to support a finding that there was a written agreement under section 2550." She also phrases the point as follows: "There was sufficient documentation to support a written agreement that satisfied section 2550." (Boldface and capitalization omitted.) We note initially that Cheryl has framed the argument improperly because, as already noted, *the trial court did not find that the parties had agreed to divide their community interest in Water Tech unequally*. If the trial court had so found, and a party were challenging that finding on appeal, then we would have to affirm the finding if it were supported by substantial evidence (and not infected with legal error). (See, e.g., *Bustamante v. Intuit, Inc.* (2006) 141 Cal.App.4th 199, 208 ["Where the existence of a contract is at issue and the evidence is conflicting or admits of more than one inference, it is for the trier of fact to determine whether the contract actually existed. But if the material facts are certain or undisputed, the existence of a contract is a question for the court to decide"].) But because the trial court did *not* find that such an agreement existed, the presence in the record of evidence from which the court *could have* inferred the existence of such an agreement is immaterial. (See, e.g., *Pope v. Babick* (2014) 229 Cal.App.4th 1238, 1245 ["We do not review the evidence to see if there is substantial evidence to support the losing party's version of events, but only to see if substantial evidence exists to support the verdict in favor of the prevailing party"]; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 874 ["it is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion" (italics omitted)].)

Thus, in order to prevail on her contention that the parties entered a written agreement for unequal division of their community interests in Water Tech, Cheryl would have to show that the record before the trial court *compelled* such a finding. (See, e.g., *Leung v. Verdugo Hills Hospital* (2012) 55 Cal.4th 291, 308 ["a reviewing court must resolve all conflicts in the evidence in favor of the prevailing party and must draw all reasonable inferences in support of the trial court's judgment"].) Cheryl does not even attempt to make that showing, so we must reject her argument for that reason alone. Moreover, any attempt to make such a showing would have been unsuccessful, because the purported evidence of a written agreement to divide the parties' community interests in Water Tech unequally is thin and unpersuasive.

In 1983, Water Tech issued 1,008 shares of common stock to "Woodrow W. Bryan and Cheryl Bryan, Husband and Wife," for which Cheryl and Bill paid Water Tech $1 per share. The strongest evidence of a written agreement for unequal division of the parties' community interests in Water Tech is an April 1, 1988, resolution of the Water Tech board of directors, which appears to have been an attempt to make Cheryl the record owner, for certain commercial purposes, of 51 percent of the shares.[8] Although the 1988 board resolution was signed only by Cheryl (as secretary of Water Tech), Bill does not challenge its validity, and he and Cheryl both signed a shareholder resolution on

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[8] According to Bill, the point of the change was to make the company eligible for special loan rates available to "woman owned" businesses. According to Cheryl, the point of the change in 1988 was to compensate her for having received less income than Bill in previous years, and a later change in 1992 (from 51 percent to 52 percent ownership for Cheryl) was an attempt to secure favorable treatment as a woman-owned business.

May 1, 1988, ratifying all acts of Water Tech's directors and officers taken within the previous year. The problem with the 1988 board resolution, however, is that on its face it does not do what it was apparently intended to do.

The 1988 board resolution states that "as extra compensation for their services to April 1, 1988, there shall be issued [to] the following officer[s] of the company the number of shares of common stock of this company set opposite their respective names," and the resolution then specifies 494 shares for Bill and 514 shares for Cheryl. Thus, although the resolution appears to have been intended to reapportion the previously issued 1,008 shares of stock, so that 514 shares (51 percent) would be in Cheryl's name and the remaining 494 shares would be in Bill's name, that is not what the resolution actually does. Rather, it provides that certain shares of stock "shall be issued" to Bill and Cheryl "as extra compensation for their services." At that time, Bill and Cheryl were already the owners (as "Husband and Wife") of 1,008 shares of Water Tech's stock, for which they had paid $1,008 in 1983. The 1988 board resolution does not refer to reapportionment of the stock that Cheryl and Bill already owned. Moreover, taking away from Bill 10 shares that he already owned and had paid for, and giving him nothing in exchange, could not possibly serve as "extra compensation" for his services to the corporation. But the 1988 board resolution expressly provides that 494 shares "shall be issued" to Bill as "extra compensation" for his services. Those 494 shares consequently could not be a portion of the 504 shares (half of 1,008) that Bill had already owned since 1983.

For all of these reasons, it is impossible to interpret the 1988 board resolution as reapportioning ownership of the stock that Cheryl and Bill already owned. Instead, the resolution calls for the issuance of the specified numbers of shares of stock to Cheryl and Bill. There is no evidence that any such additional shares were ever issued; the trial court found that Water Tech never issued any additional shares after 1983, and no party challenges that finding. The 1988 board resolution on its face does not reapportion ownership of the 1,008 shares that were issued jointly to Cheryl and Bill in 1983. *A fortiori*, the 1988 board resolution does not constitute a written agreement to divide Cheryl and Bill's previously existing community interest in Water Tech unequally. Rather, the 1988 board resolution calls for the issuance of additional stock, which was never actually issued.

The remaining documentary evidence fares no better. A shareholder resolution of May 1, 1988, merely ratifies the acts of Water Tech's officers and directors taken within the previous year. Because the 1988 board resolution does not constitute an agreement to divide the parties' community interest in Water Tech unequally (and there is no evidence of any other relevant act of the officers or directors), the 1988 shareholder resolution likewise does not constitute such an agreement. Cheryl also cites a 1992 board resolution, which ratifies the acts of Water Tech's officers and directors taken within the previous year. Cheryl claims that in the 1991-1992 tax year the board increased her stock ownership to 52 percent, but she cites no evidence of any such action by the board and concedes that the alleged resolution increasing her ownership was not admitted into evidence. And the only other documentary evidence cited by Cheryl consists of Water

Tech's tax returns and Bill's pleadings and discovery responses in the Arias litigation, which variously describe Cheryl as the "owner" or "record owner" of 51 percent or 52 percent of Water Tech's stock. Those documents merely reflect the parties' shared belief that 51 percent or 52 percent of the Water Tech stock was held in Cheryl's name (and Bill's attempt in the Arias litigation to restore his stock ownership to 50 percent). That belief appears to have been false, because the 1988 board resolution did not accomplish what the parties seem to have intended. But even if it were true, none of these documents, considered individually or together, would constitute a written agreement to divide the parties' community interest in Water Tech unequally. Again, holding stock in the name of one spouse, rather than the other spouse or both, does not necessarily affect the character or ownership of the spouses' community interests. (See *In re Marriage of Barneson*, *supra*, 69 Cal.App.4th at pp. 589-590.)

For all of these reasons, we reject Cheryl's argument that the parties agreed in writing to divide their community interests in Water Tech unequally.

Fourth and finally, Cheryl argues that the parties orally stipulated in open court to an unequal division of their community interests in Water Tech.[9] As evidence of the oral stipulation, Cheryl cites Bill's testimony that he signed Water Tech's tax returns and corporate resolutions and that in the Arias litigation he sought to restore his 50 percent stock ownership. We have already determined that those documents do not constitute a

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[9] Cheryl also repeats the argument—which we have already rejected—that an out-of-court oral agreement for unequal division of community property is enforceable if it was made before the marital dissolution action was filed, notwithstanding section 2550.

written agreement to divide the community interest in Water Tech unequally. Accordingly, Bill's testimony acknowledging the documents' authenticity does not constitute an oral stipulation in open court to divide the community interest in Water Tech unequally. We note also that Bill testified that although he was aware that 52 percent of the Water Tech stock was in Cheryl's name, he "[a]bsolutely never thought that it would affect [his] community interest."

For all of the foregoing reasons, Cheryl has not shown that the trial court erred by dividing the value of Water Tech equally between the parties.

C. *Water Tech de Mexico and Breach of Fiduciary Duty*

According to Cheryl, Bill breached his fiduciary duty both by naming himself as the holder of 99 percent of Water Tech de Mexico's stock and by failing to disclose the unequal ownership to Cheryl. She further contends that the trial court "recognized Bill's breach of his fiduciary duty to disclose." She argues, however, that the court erred by finding that Water Tech de Mexico was a wholly owned subsidiary of Water Tech. That error, she claims, prevented the trial court from ordering the appropriate remedy for Bill's breach of fiduciary duty, namely, to award Bill 99 percent of the $1.7 million debt owed by Water Tech de Mexico to Water Tech.[10] We conclude that Cheryl has again failed to show any reversible error.

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10 Bill argues that Cheryl forfeited this argument by failing to raise it in the trial court. In closing argument, Cheryl's counsel contended that Bill's creation and alleged nondisclosure of the unequal ownership of Water Tech de Mexico's stock was a breach of fiduciary duty, and Cheryl's proposed statement of decision included a proposed

First, the trial court did find that "Water Tech de Mexico was . . . a wholly owned subsidiary of Water Tech." That finding does not appear to be supported by substantial evidence, and it conflicts with the trial court's findings that (1) Bill and Cheryl were the owners of Water Tech de Mexico's stock, and (2) Water Tech, Water Tech de Mexico, and two other family businesses were all "properties . . . obtained during marriage" and therefore were community property. The court's finding that Water Tech de Mexico was a wholly owned subsidiary of Water Tech did not, however, play any role in the court's analysis. Rather, the court ruled that because Water Tech de Mexico was community property, "the corporation[], proceeds from sale and debts are community and shall be evenly divided." Because the court did not rely on the finding that Water Tech de Mexico was a subsidiary of Water Tech (let alone rely on that finding *to Cheryl's detriment*), Cheryl has failed to show that the finding prejudiced her. (*In re Marriage of McLaughlin*, *supra*, 82 Cal.App.4th at p. 337 ["The burden is on the appellant in every case to show that the claimed error is prejudicial"].) We accordingly conclude that any error in finding Water Tech de Mexico to be a wholly owned subsidiary of Water Tech was harmless.

Second, although Cheryl asserts that the trial court "recognized Bill's breach of his fiduciary duty to disclose," her citation to the record yields no support for that assertion. Having reviewed the judgment and statement of decision, we conclude that the assertion

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finding that Bill breached his fiduciary duty on that basis. We conclude that Cheryl's conduct was sufficient to preserve the issue for appeal.

is false—the court did not find any breach of fiduciary duty by Bill in connection with the ownership of Water Tech de Mexico's stock.

Third, Cheryl has not shown any error in the court's failure to find such a breach or award a remedy for it. The court found that, although the majority of the stock was held in Bill's name, Water Tech de Mexico—like Water Tech and two other family businesses—was acquired during marriage and was therefore community property. Cheryl does not argue that those findings were not supported by substantial evidence. And those findings require rejection of Cheryl's breach of fiduciary duty claim, because such a claim is actionable only if the breach "results in impairment to the claimant spouse's present undivided one-half interest in the community estate." (§ 1101, subd. (a).) The trial court found that Cheryl's one-half interest in the community estate was not impaired by the unequal holding of the Water Tech de Mexico stock—the corporation remained community property, so its value (including all assets and liabilities) was evenly divided.

D. *Sale of Real Property*

The trial court found as to eight of Cheryl and Bill's real properties that "no competent evidence to determine value" was introduced. The court accordingly ordered those properties sold and the proceeds equally divided, because "only a sale will

effectuate an equal division of property." In her opening brief, Cheryl does not challenge the finding that no competent evidence of the value of the properties was introduced.[11]

Instead, Cheryl claims that Bill agreed that she could have some of those properties if she paid certain minimum prices for them, which she agreed to pay. On that basis, Cheryl argues that the trial court erred by ordering that the properties be sold, and the proceeds evenly divided between the parties, rather than awarding those properties to Cheryl with equalization payments to Bill pursuant to the parties' agreement. The argument lacks merit.

Bill did not agree to sell those properties to Cheryl. Rather, in his proposed statement of decision, Bill requested that all of those properties be sold, and the proceeds divided equally. Cheryl's contrary assertion is based on Bill's testimony during cross-examination. With respect to certain properties, Bill was asked whether he would "object" to Cheryl's taking those properties if she were willing to pay above a certain price, and he said that he would not.[12] Cheryl cites no authority for the proposition that such testimony must or even may be treated as a binding agreement, and we are aware of

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11 In her reply brief, Cheryl argues that the record does contain competent evidence of the properties' value. Because this argument was raised for the first time in reply and Cheryl has not shown good cause for failure to raise it in her opening brief, we need not address it. (*Campos v. Anderson*, *supra*, 57 Cal.App.4th at p. 794, fn.3.) Moreover, when she belatedly raises the argument in her reply brief, Cheryl provides no citations to the record to support it. For that reason as well, we deem the argument forfeited. (*Nwosu v. Uba*, *supra*, 122 Cal.App.4th at p. 1246.)

12 In her opening brief, Cheryl also mentions Bill's testimony concerning Water Tech's airplane, which the court awarded to Bill. It is not clear why Cheryl mentions that testimony, given that her argument concerns property that was ordered sold, and the airplane was not ordered sold.

none. If Cheryl genuinely believed that the parties had entered a binding agreement on this issue, then she could have sought to enforce it in the trial court. She did not, and her proposed statement of decision did not take the position that such an agreement existed. We also note that with respect to two of the properties, Bill testified only that he would not "object" to Cheryl's buying them at a certain price "[i]f the fair market value" were above a certain level. Again, as to the properties in question, the court found that there was "no competent evidence to determine value," and Cheryl's opening brief does not challenge that finding.

Cheryl argues on three additional grounds that the trial court erred by ordering the properties sold. First, she argues that the court can order sale of the properties only if "'neither party is in a position to purchase the share of the other.'" (*In re Marriage of Holmgren* (1976) 60 Cal.App.3d 869, 873 (*Holmgren*).) Cheryl cites *Holmgren*, and *In re Marriage of Davis* (1977) 68 Cal.App.3d 294 (*Davis*) in support of her argument, but neither case stands for the proposition on which Cheryl relies. In *Holmgren*, the trial court ordered that the marital home be sold and the proceeds divided equally. (*Holmgren*, *supra*, at p. 872.) The wife challenged that order on appeal, but the Court of Appeal affirmed, reasoning that sale of the house was "necessary to divide the property" because "the wife [was] financially unable to purchase the husband's share of the house." (*Id.* at p. 873.) *Davis*, rejected an argument that the trial court lacked jurisdiction to order sale of the parties' real property. The Court of Appeal held that the trial court has "jurisdiction to order a sale of the community property including community real property when, in the exercise of a sound judicial discretion, the court concludes that it

should do so in order to accomplish an equal division of the community property." (*Davis*, *supra*, at p. 306.) Neither case holds or in any way suggests that sale of real property is authorized *only* when neither party is able to purchase the other party's share. In general, "the court has broad discretion to determine the manner in which community property is divided." (*In re Marriage of Duncan* (2001) 90 Cal.App.4th 617, 631.) Because Cheryl cites no authority for limiting the sale of community real property to cases in which neither party is able to purchase the other party's share, and we are aware of none, her argument fails.

Second, Cheryl argues that the court misapplied *In re Marriage of Cream* (1993) 13 Cal.App.4th 81 (*Cream*). In that case, the trial court had ordered, over the wife's objection, an interspousal auction of the family business. (*Id.* at pp. 84-85.) The Court of Appeal reversed because "[w]ithout a stipulation of the parties, the trial court cannot abdicate its statutory responsibility to value and divide the community estate. . . . [T]he court has no authority to order an interspousal auction of a community asset, over the objection of a party, as a substitute for the court valuing and making its award of that asset." (*Id.* at p. 89.) Cheryl contends that the trial court should not have applied *Cream* at all, because (1) Bill did not object to sale of the properties to Cheryl, and (2) the sale of the properties to Cheryl would not be the result of a prohibited interspousal auction. The contentions are meritless because (1) Bill in fact requested that the properties be sold and the proceeds equally divided, and (2) nothing in the statement of decision suggests that the trial court ordered the properties sold on the ground that the alternative would be a prohibited interspousal auction. Moreover, Cheryl does not explain how she was

prejudiced by the trial court's putative misapplication of *Cream*. Cheryl does not deny that the court had a nondelegable duty to determine the value of the community assets, and her opening brief does not challenge the court's finding that there was no competent evidence of the value of these properties. It was therefore well within the court's discretion to order the properties sold.

Third, Cheryl argues that the court "'should have required the parties to furnish additional evidence or . . . should have appointed [its] own expert to testify on that issue.'" (*In re Marriage of Hargrave* (1985) 163 Cal.App.3d 346, 355 (*Hargrave*).) That argument too is meritless. The marital asset whose value was at issue in the quoted passage from *Hargrave* was the goodwill of the community property business. (*Id*. at pp. 352-355.) The Court of Appeal found that the record was "barren of evidence on this vital issue." (*Id.* at p. 355.) Accordingly, the trial court erred by determining, on the basis of no evidence, that the value was $35,000, rather than appointing an expert or requiring the parties to submit additional evidence. (*Id.* at pp. 354-355.) The case does not stand for the proposition that *every* time the parties introduce insufficient evidence of the value of a marital asset, the court *must* require them to provide such evidence or appoint an expert. An alternative approach, of course, would be to order that the asset in question be sold. (That approach was presumably unavailable in *Hargrave*, because selling the goodwill of the family business was presumably impossible.) The trial court took that approach here, and Cheryl has not shown that the court abused its discretion or otherwise erred.

E. *The Arias Litigation and Breach of Fiduciary Duty*

Finally, Cheryl claims that Bill "reneged" on his agreement to have Water Tech pay Arias $1 million for his assistance with the sale of Water Tech. Cheryl argues that Bill's conduct constituted a breach of fiduciary duty because it generated the Arias litigation, causing Water Tech to incur liability of $150,000 for Arias's attorney fees and also requiring Cheryl to spend $50,000 on her own attorney fees. The trial court declined to reimburse Cheryl for any of those funds, and Cheryl argues that the court thereby erred.

Cheryl's argument is meritless, because Bill testified that he did not agree to pay Arias $1 million *unconditionally*. Rather, he testified that he agreed to have Water Tech pay $1 million to Arias *if Cheryl agreed to equalize the stock ownership of Water Tech* rather than keeping 52 percent in her name. There was conflicting evidence on that point,[13] but Bill's testimony constitutes substantial evidence that his agreement to pay Arias was conditional. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614 [testimony of a single witness can constitute substantial evidence].) Because the factual premise for Cheryl's argument is that Bill "reneged" on an unconditional agreement, and the record contains substantial evidence that the agreement was conditional, substantial evidence likewise supports the trial court's findings that Cheryl's claims for these funds were "[u]nsubstantiated." We therefore must affirm the trial court's rejection of these claims.

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[13] Arias testified that Bill agreed to have Water Tech pay Arias the $1 million unconditionally.

II. *Bill's Cross-Appeal*

A. *Dilution of Sanctions Award*

The trial court found various breaches of fiduciary duty by the parties and awarded sanctions on that basis. The court found that Bill's sale of a car worth $7,150 was a breach of fiduciary duty under section 1101, subdivision (g), and on that basis awarded $3,575 in sanctions to Cheryl (i.e., 50 percent of $7,150). The court found that Cheryl's removal of $175,000 from a bank account was a breach of fiduciary duty under section 1101, subdivision (g), and Cheryl's removal of $190,000 from another account and cashing a corporate check for $8,964.30 were breaches of fiduciary duty under section 1101, subdivision (h). On that basis, the court awarded sanctions of $286,464.30 to Bill, consisting of 50 percent of $175,000 (i.e., $87,500) plus 100 percent of $190,000 and $8,964.30.[14] Thus, the net sanctions award to Bill was $282,889.30 (i.e., the $286,464.30 award to Bill minus the $3,575 award to Cheryl). The court then ordered that "[a]t the time of the corporate bank account division, the amount owed to [Bill], from [Cheryl], ($282,889.30) for breach of fiduciary duty shall be awarded to [Bill] from the top of the bank accounts, with the balance evenly divided."

Bill argues that the court erred by ordering payment of the sanctions "off the top," before division of the bank accounts, because the effect of that procedure is that "Bill's

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[14] The remedy for a breach of fiduciary duty under section 1101, subdivision (g), "shall include . . . an award to the other spouse of 50 percent, or an amount equal to 50 percent, of" the asset in question, but the remedy for a breach under section 1101, subdivision (h), "shall include . . . an award to the other spouse of 100 percent, or an amount equal to 100 percent, of" the asset in question.

community share of the corporate bank accounts is paying 50 percent of the section 1101[, subdivision] (h) sanctions." Bill concludes that he "is entitled to 100 percent of the $198,964.30 in section 1101[, subdivision] (h) sanctions from Cheryl's share of the community funds." Cheryl concedes the error, and we agree. We therefore modify the judgment to provide that the award of $198,964.30 under section 1101, subdivision (h), shall be paid to Bill directly from Cheryl's one-half share of the corporate bank accounts, and only the remaining $83,925 of the sanctions award shall be paid to Bill from the top of the bank accounts, before they are divided.[15]

B. *Riviera Property and Breach of Fiduciary Duty*

The trial court found that "the corporate Bank of America account was drained post separation . . . of $258,090" by Cheryl. The funds "went directly to [Cheryl's] Riviera residence," but she testified in her deposition that the money "was borrowed from Chris Frattasio. By her own testimony, the $258,090 has not been paid back to the community/corporation but was paid to Chris Frattasio, who had made payments for undocumented community debts." The court further observed that Cheryl "did not produce testimony of Chris Frattasio to support her claims nor any documentation as to the Frattasio loan or pay offs by Frattasio." The court concluded, "[b]ased on [Cheryl's]

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15 We note that even this procedure appears to be incorrect, because the $282,889.30 net sanctions award to Bill already reflected only 50 percent of the value of the asset in question for the breach under section 1101, subdivision (g). Consequently, it would seem that the entire net sanctions award (and not just the portion under section 1101, subdivision (h)) should be paid directly from Cheryl's share of the accounts rather than from the top. Bill does not raise this argument, however, so we deem it forfeited. (See, e.g., *Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632 ["The burden of demonstrating error rests on the appellant"].)

demeanor during the testimony of this item, the court finds that [Cheryl] is not credible as to the loan and subsequent repayment to Chris Frattasio."

On appeal, Bill states that he "requested an award of 100 percent of the $258,090" as sanctions under section 1101, subdivision (h), but "the court did not award any sanctions" concerning the $258,090. Bill argues that the failure to award sanctions was error, given the court's findings that after separation Cheryl used $258,090 of community funds for her separate property residence, never repaid the funds to the community, misrepresented the source of the funds at her deposition, and continued to lie about the role of Frattasio in her testimony at trial. Bill further argues that the court's error "deprived [him] of . . . the mandatory right to attorney's fees."

Bill's argument is meritless. The judgment awards the entire $258,090 to Bill, which is precisely the sanction he claims to have requested. The judgment does not describe the $258,090 award as a sanction for breach of fiduciary duty, but Bill does not explain how he was prejudiced by the failure to describe the award in those terms. And attorney fees under section 1101, subdivision (h), are discretionary, not mandatory. (See § 1101, subds. (g), (h); Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2018) ¶ 8:625.) Bill does not argue that he applied for such a discretionary award, let alone that the trial court abused its discretion by denying such a request.

C. *$14,032.75 Escrow Refund and $50,000 Cash Withdrawal*

Bill argues that the trial court erred by rejecting his claim for $14,032.75 in community funds that were allegedly misappropriated by Cheryl. The funds were an escrow refund from the sale of real property belonging to the community. In his opening

brief, Bill states that Cheryl deposited the funds in "an old community account"; Cheryl did so testify. Bill further states that "[a]fter" making that deposit, Cheryl "opened new accounts to hold the community monies . . . , but she did not transfer the community property escrow refund to the new accounts, instead keeping the money in the former community account, which from March 2012 on, she retained as her separate account." Bill's citations to the record do not support his assertion that "the former community account" was "retained as her separate account" by Cheryl, and Cheryl in fact testified to the contrary that the relevant accounts "were still community accounts."[16] Moreover, Cheryl testified that although she did not subsequently transfer the $14,032.75 escrow refund to the new community accounts that were created, she accounted for the $14,032.75 in a "cash balance reconciliation" addressing the community's "actual and anticipated cash receipts and disbursements." (Block capitals omitted.) Accordingly, the trial court's finding that Bill's claim was "unsubstantiated" is supported by substantial evidence. That is, substantial evidence supports the court's finding that Bill failed to substantiate his claim that Cheryl misappropriated the funds—the record contains substantial evidence that Cheryl deposited the escrow refund into a community account and addressed it in her cash reconciliation.

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16 In his reply brief, Bill changes his theory of the facts, stating that when Cheryl deposited the escrow refund, the account into which she deposited it "was closed to the community." Again, we do not consider arguments raised for the first time in a reply brief absent a showing of good cause, and Bill has made none. (*Campos v. Anderson*, *supra*, 57 Cal.App.4th at p. 794, fn.3.) In any event, as already noted, Cheryl testified that the relevant accounts "were still community accounts."

Finally, Bill argues that Cheryl misappropriated $50,000 that she withdrew from a community bank account in October 2013. Cheryl testified that she used the $50,000 to purchase sprinkler heads for the community business. The trial court noted that Cheryl failed to provide any documentary evidence (such as "tax returns or receipts") confirming that use of the $50,000, but the court nonetheless found that Bill had not "met his burden of proof as to this item." There was conflicting evidence on the issue—Bill's accounting expert testified that the sprinkler purchase was not reflected on the tax returns—but Cheryl's testimony constitutes substantial evidence that she used the $50,000 to purchase sprinkler heads for the community business. (*Thompson v. Asimos* (2016) 6 Cal.App.5th 970, 981 ["A single witness's testimony may constitute substantial evidence to support a finding"].) The trial court's finding that Bill failed to substantiate his claim is therefore supported by substantial evidence.

DISPOSITION

The judgment on reserved issues, entered on October 24, 2016, is modified as follows: (1) In paragraph 7(g) on page 27, the amount $282,889.30 is stricken and replaced by $83,925; and (2) in paragraph 7(h) on page 28, the amount $428,221.35 is stricken and replaced by $627,185.65. As modified, the judgment is affirmed. Woodrow William Bryan shall recover his costs of appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MENETREZ
J.

We concur:

RAMIREZ
P. J.

MILLER
J.